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No. 96-1789

In the Supreme Court of the United States

OCTOBER TERM, 1996

SAMUEL MARTINEZ-SERRANO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
LORRI L. SHEALY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner waived any argument that the Board of Immigration Appeals abused its discretion in denying his motion to reconsider its decision finding him deportable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 94 F.3d 1256. The decisions of the Board of Immigration Appeals (Pet. Supp. App. 1-7) and the immigration judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. A petition for rehearing was denied on November 19, 1996. Pet. App. B. The petition for a writ of certiorari was filed on February 18, 1997, and placed on the docket on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Mexico, entered the United States illegally in or around 1980. Pet. Supp. App. 5. In 1987, his status was adjusted to that of an alien lawfully admitted for temporary residence under the provisions of Section 210(a)(1) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1160(a)(1), as a "special agricultural worker." Pet. Supp. App. 5; see also 8 U.S.C. 1160(a)(2) and (g) (providing for further adjustment of status to that of alien lawfully admitted for permanent residence).

In 1990, petitioner returned to Mexico and brought three of his children (then 4, 8, and 9 years old), all of them Mexican nationals who had not requested or received permission to enter this country, to Mexicali, on the Mexican side of the border between the United States and Mexico. Pet. Supp. App. 5; Pet. 3. Petitioner thereafter was arrested by agents of the Border Patrol who found him, together with his children, on the United States side of the border. Pet. Supp. App. 5; Pet. 3.

2. The Immigration and Naturalization Service (INS) began proceedings to deport petitioner for entering the United States without inspection. Pet. Supp. App. 5. In proceedings before an immigration judge (IJ), petitioner refused to answer questions concerning the time and manner of his last entry into the United States. *Ibid.* He did testify, however, that he brought the children to Mexicali "[f]or the purpose of coming to the United States." Admin. R. 91.

The IJ found that "[t]he only logical inference to be drawn from the respondent's testimony is that he, as well as his three Mexican born children, entered the United States without inspection as alleged." Admin.

R. 63. He held (*ibid.*), however, that the degree of certainty to be accorded that inference was "not germane," because once petitioner had admitted that he was an alien, he became subject to a presumption established by Section 291 of the INA, 8 U.S.C. 1361, that he was in the United States illegally, unless he could establish the time, place, and manner of his legal entry into the country. "In short, based upon the presumption, any doubts with regard to date, place and manner of entry will be resolved against the alien, not for him." Admin. R. 63. Accordingly, the IJ held that deportability had been established "based upon the presumption under Section 291 of the Act." *Ibid.* The IJ granted petitioner the right to depart voluntarily in lieu of deportation, and ordered him deported if he failed to depart. *Id.* at 64-65.

3. On October 3, 1990, Petitioner appealed to the Board of Immigration Appeals (BIA), seeking only a decision allowing him to depart voluntarily without any finding of deportability (on the theory that he could then return to the United States, submitting to inspection at the border, and reclaim his lawful residency status). Pet. Supp. App. 2; Admin. R. 59. In February 1991, petitioner's representative requested and received an extension of time in which to file a brief in connection with that appeal, on the ground that he had been called to temporary active military duty. Admin. R. 49. On July 29, 1991, the Board issued an order holding that once the INS had commenced deportation proceedings, the IJ was required to make some finding on the issue of deportability. Pet. Supp. App. 2. Declaring further that it was "satisfied that the respondent's deportability has been established by evidence that is clear, unequivocal, and

convincing," the Board dismissed petitioner's appeal. *Ibid.*, citing 8 U.S.C. 1361.

In October 1991, petitioner filed a motion asking the BIA to reopen the case and reconsider its previous decision. Pet. App. A, at 10938. In that motion, petitioner's representative asserted that his military service had "precluded submission of additional legal arguments" in connection with the previous appeal. Admin. R. 11. The motion stated that

> the *primary basis* for making this Motion to Reopen and Reconsider is to allow the Board to remand the case of the Moving Party back to the jurisdiction of the Immigration Court, so that the Moving Party might have the opportunity to apply for a waiver of deportability pursuant to section 241(a)(1)(E)(ii) of the Act * * *. This relief was not available to the Moving Party at the time he appeared before the Immigration Judge, nor was it available at the time appeal to the Board was filed.

Ibid. (emphasis in original).[1]

After a discussion (Admin. R. 12-16) of petitioner's theory that such a waiver would allow him to remain a

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[1] Subparagraph (i) of former Section 241(a)(1)(E) of the INA, 8 U.S.C. 1251(a)(1)(E)(i) (1994), rendered deportable any alien who knowingly assisted another alien to enter the United States in violation of law. Subparagraph (ii), added in late 1991 by Pub. L. No. 102-232, § 307(h)(4), 105 Stat. 1755, rendered that provision inapplicable in certain cases involving family reunification. (These provisions were recently renumbered, without relevant change here, by Section 305(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-598, and are now to be found in Section 237 of the Act, to be codified at 8 U.S.C. 1227.) Petitioner was not charged with deportability under former Section 241(a)(1)(E)(i). See Pet. Supp. App. 6-7.

lawful resident, the motion then set out two issues to be considered: Whether the waiver argument just described was "germane to the instant case," and whether the Board had erred in its previous holding that the IJ was required to make a finding concerning deportability. *Id.* at 17.[2] In discussing the first issue, petitioner then argued that the availability of a new type of waiver under a provision dealing with the smuggling of aliens (with which petitioner had never been charged) was relevant to his case because (i) the IJ should not have relied on a presumption under Section 291 of the Act, or on petitioner's refusal to answer questions concerning the circumstances of his entry, to find that petitioner had entered without inspection (*id.* at 18-23), and therefore (ii) petitioner should really have been charged with smuggling his children, and if he had been so charged, the waiver of deportation based on that charge available under recent amendments to the Act would be relevant to his motion to reopen (*id.* at 23-24).

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[2] The motion sets out the following under the heading "Issues in Motion" (Admin. R. 17):

> ISSUE I: Is consideration of an application for waiver of deportability pursuant to section 241(a)(1)(E)(ii) of the Act germane to the instant case?
>
> ISSUE II: Does the Board err as a point of law in declaring, as it does in its decision in the instant case, that the immigration judge "must make a finding on deportability" and that "[n]either the immigration judge nor this Board can allow the alien to depart from the United States voluntarily without making that determination"?

The BIA denied the motion to reopen and reconsider. Pet. Supp. App. 4-7.[3] The Board rejected petitioner's attempt to rely on any newly available waiver under Section 241(a)(1)(E) of the Act, on the ground that petitioner had never been charged with any ground of deportability to which such a waiver might apply. Pet. Supp. App. 6-7. In addition, the Board noted (*id.* at 7) that even if petitioner were granted a waiver under Section 241(a)(1)(E), he would remain deportable as charged under Section 241(a)(2). The Board also adhered to its previous determination that once petitioner had been charged, neither an IJ nor the BIA could grant him voluntary departure without entering a finding on the issue of deportability. *Id.* at 5-6.

4. Petitioner sought review in the court of appeals of both the 1991 dismissal of his initial appeal and the 1994 denial of his motion to reopen and reconsider. Pet. App. A, at 10940. In August 1996, the court of appeals denied the petition for review. *Id.* at 10935-10944. The court held (*id.* at 10940-10941) that it had no jurisdiction to review the BIA's 1991 decision, relying on this Court's holding in *Stone* v. *INS*, 514 U.S. 386 (1995), that the filing of a motion to reopen does not toll the time for appeal from an otherwise final decision by the Board. The court concluded that the petition to review the Board's denial of the motion to reopen or reconsider was timely (Pet. App. A, at 10941-10943), but it found (*id.* at 10944) that the argument portion of petitioner's brief had addressed

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[3] The supplemental appendix erroneously shows a date of July 29, 1991, for the Board's decision on the motion to reopen. Pet. Supp. App. 4. The correct date is June 24, 1994. Admin. R. 2.

only the issue of timeliness and whether the BIA had erred in dismissing his original appeal. Because petitioner's arguments "fail[ed] to address how the BIA abused its discretion by denying his motion to reopen and reconsider," the court held that petitioner had waived any such claim. *Id.* at 10943-10944. The court accordingly denied the petition for review in its entirety. *Id.* at 10944.

4. The court of appeals' mandate issued on March 14, 1997. We are informed that on April 21, the District Director of the INS in San Francisco wrote to petitioner requiring him to report for deportation on May 19. On May 20, Justice O'Connor denied petitioner's application for a stay, and we are informed that petitioner was deported to Mexico later that day.

ARGUMENT

1. Petitioner has been deported to Mexico. Former Section 106(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(c) (1994), which applies to this case, provides that "[a]n order of deportation * * * shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order."[4] "Once an alien has been de-

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[4] Section 106(c) has been repealed, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(b), 110 Stat. 3009-612, but that change applies only to proceedings commenced on or after April 1, 1997, IIRIRA §§ 306(c)(1) (as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657), 309(a), and the applicable transitional rule specifically provides that earlier deportation "proceedings (including judicial review thereof) shall continue to be conducted without regard to" the repeal. IIRIRA § 309(c), 110 Stat. 3009-625. The deportation proceedings against petitioner were commenced in 1990. Pet. Supp. App. 5.

ported, the courts lack jurisdiction to review the deportation order's validity." *Stone* v. *INS*, 514 U.S. 386, 399 (1995).[5]

2. Even if petitioner's claims were now reviewable, however, they would not warrant review by this Court. To reach the question that he seeks to present, petitioner must first argue (Pet. 16-25) that the court of appeals erred in holding that he had waived any argument that the BIA abused its discretion in denying his motion to reopen or reconsider, as distinguished from committing legal error in its original decision upholding the IJ's order of deportation. The court below adequately explained its reasoning on that fact-bound issue, which does not merit further review. Pet. App. A, at 10943-10944.[6]

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[5] Some courts of appeals have asserted jurisdiction to review executed deportation orders if the deported alien raises a "colorable" constitutional claim. See, *e.g.*, *Camacho-Bordes* v. *INS*, 33 F.3d 26, 27-28 (8th Cir. 1994) (discussing cases). That position finds no support in the language of the Act. Even if it were correct, however, this case involves only the BIA's decision not to reopen its original decision on the merits of the case to consider arguments that petitioner had not previously raised, and the court of appeals' decision that petitioner waived on appeal any argument that that decision involved an abuse of the Board's discretion. Those essentially procedural issues do not involve colorable constitutional claims.

[6] It is not surprising that petitioner's opening brief below focused on convincing the court that the Board had erred in its decision on the merits, because at the time the brief was filed the Ninth Circuit had held that a petition to reopen tolled the time to appeal from the Board's original decision, so that an appeal from the denial of such a motion was, in effect, consolidated with the appeal of the original decision. See Pet. App. A, at 10940; Pet. 5-6. The court of appeals correctly held, however, that once this Court's decision in *Stone* v. *INS* made clear that petitioner's appeal from the Board's original decision

In any event, the Board plainly did not abuse its discretion. As we have described (see pages 4-6, *supra*), petitioner's motion squarely requested only that the Board (i) reconsider the argument, which it had already considered and rejected, that the IJ could have allowed petitioner to depart voluntarily without finding him deportable, and (ii) reopen the proceeding to consider for the first time the potential applicability of a newly enacted statutory waiver provision. The Board rejected both of those arguments—summarily, but in effect on their merits—in denying petitioner's motion. Pet. Supp. App. 5-7. The argument on which petitioner focused in the court of appeals, and which he now seeks to raise in this Court, was available at the time of petitioner's original appeal to the Board, but was presented for the first time in support of the motion to reopen (see Pet. 17), and even then only in an indirect and confusing manner, as part of the new waiver argument which the Board rejected on other and simpler grounds. See pages 4-5, *supra*; Admin. R. 17-23. Even if we assume that, under those circumstances, the Board could properly have reopened the proceedings to reconsider the original issue of deportability, it surely was not required to do so.[7]

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in this case was untimely (see Pet. App. A, at 10940-10941), some argument going directly to the issue of reopening or reconsideration, rather than simply to the merits of the original decision, was necessary to sustain the remainder of the appeal.

[7] We may also assume, as petitioner argues in passing (Pet. 24), that the BIA, like a district court, "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405

3. Finally, even if the question that petitioner seeks to raise in this Court (Pet. i, 7-15) were properly presented, it would not warrant review.

Section 291 of the INA, 8 U.S.C. 1361, provides that an alien in deportation proceedings bears the burden of proving "the time, place, and manner of his entry into the United States," and that an alien who cannot carry that burden "shall be presumed to be in the United States in violation of law." Petitioner argues (Pet. 14-15) that he could establish the requisite lawful "entry" simply by showing that he had once had his status adjusted to that of an alien lawfully admitted and permitted to reside in this country. Even a permanent resident alien, however, must enter the country at designated border crossings and submit to inspection by an immigration official each time he enters the United States—as, for that matter, must a citizen, at least under any normal circumstances. *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 945-946 (7th Cir. 1993); *In re Ruis*, 18 I. & N. Dec. 320 (BIA 1982). The ground for deportation alleged against petitioner in this proceeding was his failure to comply with those requirements at the time of his last entry; and that entry was therefore the relevant one for purposes of Section 291.[8]

(1990). That principle applies, however, only to arguments fairly presented to a tribunal for consideration, and subject to appellate review as of right. It does not alter any of the familiar principles of exhaustion or waiver.

[8] Petitioner relies (Pet. 9-13) on *Trias-Hernandez* v. *INS*, 528 F.2d 366 (9th Cir. 1975), and *Gameros-Hernandez* v. *INS*, 883 F.2d 839 (9th Cir. 1989). Neither decision is inconsistent with the result in this case. *Trias-Hernandez* considered the admissibility of a document containing evidence of admissions by the alien that he had departed from the United States, after

There is, moreover, nothing unreasonable about placing on an alien in this country the burden of demonstrating lawful entry when, as here, that issue is properly raised; and there was nothing unreasonable about the application of that principle in this case. After petitioner conceded alienage but refused to enter a plea concerning entry without inspection or deportability, the IJ took the refusal as a denial and required the INS to proceed. Admin. R. 77-78, 112. Petitioner was informed of his burden to establish proper entry, and of the consequence of failing to do so. *Id.* at 82, 84. Petitioner nonetheless refused to answer questions concerning his last entry into the United States, invoking his right not to be compelled to incriminate himself. *Id.* at 90-91. Petitioner admitted, however, that he went to Mexico because he wanted to reunite his family; that he brought three of his children, all Mexican citizens and ranging in age from four to nine, to a town near the border, for the purpose of coming to the United States; and that he and his children returned to the United States on the

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previously being admitted as a lawful permanent resident, and then had returned illegally. After holding that the document was admissible, the court explicity observed that "[u]nder 8 U.S.C. § 1361, [the alien] bore the burden of proof on the issue of legal entry." 528 F.2d at 370. Because the alien offered no further evidence concerning the circumstances of his return to the United States, the finding of deportability was affirmed. *Ibid.* In *Gameros-Hernandez*, a permanent resident alien testified with respect to the time, place, and manner of his last entry, thus providing evidence to carry his burden under Section 291; the court concluded only that the government's circumstantial evidence of illegal entry was insufficient to overcome the alien's showing. 883 F.2d at 841-842. In this case, by contrast, petitioner refused to testify concerning the circumstances of his last entry, as discussed below.

same day and were apprehended together, in the United States, by agents of the INS. *Id.* at 91-92.

As the immigration judge concluded (Admin. R. 63), "[t]he only logical inference to be drawn from [petitioner's] testimony is that he, as well as his three Mexican born children, entered the United States without inspection as alleged." Indeed, petitioner's refusal even to assert that he entered the country legally, or to testify at all concerning the circumstances of his own entry, invoking a right against self-incrimination, itself gives rise to an inference of illegal entry that is both compelling and, in this context, entirely permissible. See, *e.g.*, *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-155 (1923); *United States* v. *Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984); see also *United States* v. *Rylander*, 460 U.S. 752, 758-761 (1983). Whether phrased in terms of the presumption under Section 291 or as the "only logical inference" from the evidence presented, there is no doubt that the immigration judge's conclusion was well founded and that petitioner was properly deported.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
LORRI L. SHEALY
Attorneys

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